Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE
COURT OF APPEALS OF INDIANA

ANDREW SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0712-CR-1005
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0611-FA-17

JUNE 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

Defendant-Appellant Andrew Smith (Smith) pleaded guilty and was convicted of dealing cocaine, a Class A felony. Pursuant to the plea agreement, Smith was sentenced to twenty-five years in the Department of Correction with twenty years executed and five years suspended.

Smith asserts on appeal that the trial court erred in imposing a reimbursement order for $200 to the Public Defender and that the sentence is inappropriate, given the nature of the offense and the character of the offender.

Order for Reimbursement to the Public Defender

In the written sentencing order of October 22, 2007 the trial court stated that as a term and condition of probation, Smith was to "reimburse the Tippecanoe County Public Defender in the amount of $200.00." (App. at 35). The court had earlier at the October 15, 2007 sentencing hearing stated from the bench that Smith was to reimburse the Public Defender in the amount of $200. (App. at 69). The court did not specify which, if any, of three statutes was the basis for the reimbursement order. However, as pointed out by Smith, each of the three statutes, Ind. Code § 35-33-7-6(c)(1), Ind. Code § 33-37-2-3 and Ind. Code § 33-40-3-6 requires a hearing to determine the defendant's ability to pay costs of representation.[1] Here, no such hearing was conducted nor did the court find that Smith had the ability to pay such cost of representation.

The State concedes that "imposition of the fee was likely an abuse of discretion." We so hold and remand with an order to vacate the reimbursement order. See Davis v. State, 843 N.E.2d 65 (Ind. Ct. App. 2006), *trans. denied*; May v. State, 810 N.E.2d 741 (Ind. Ct. App. 2004). Should the Public Defender choose to pursue reimbursement, the court may reconsider

[1] Reimbursement under Ind. Code § 35-33-7-6(c)(1) is limited to a fee of $100. Ind. Code § 33-40-3-6 contemplates reimbursement for "reasonable attorney fees" which may not exceed "the cost of defense services rendered." Ind. Code § 33-37-2-3 is worded similarly to Ind. Code § 33-40-3-6 except that it speaks in terms of a finding that defendant is able to pay "part of the cost of representation." (Emphasis supplied). We will not surmise that the trial court based its order upon any or all of the statutes set forth.

the matter following a hearing. However, we would observe that such would merely consume the very public resources sought to be recouped.

Inappropiateness of Sentence

Smith requests us to revise his sentence downward under our discretionary authority under Appellate Rule 7(B). He notes that the trial court found that he was remorseful and took responsibility for his actions, that his guilty plea benefited the State, that he had family support and that his incarceration would be a hardship upon his mother. As aggravators, the court found that he had a criminal history, was on probation at the time of the instant offense and that the minimum sentence of twenty years was non-suspendable. The court specifically stated that the mitigating circumstances outweighed the aggravating circumstances. Smith was then sentenced to a term of twenty-five years, with the minimum permissible sentence of twenty years to be executed, seventeen at the Department of Correction and three years in Community Corrections. Five years of the twenty-five year sentence were suspended with two years on supervised probation and three years on unsupervised probation.

As to the nature of the offense, Smith argues that his Class A felony offense is not as egregious because the cocaine sale was made to someone in the employ of the police, a confidential informant, in a controlled buy rather than to a " child [or] some unfortunate drug addict." (Appellant's Br. at 16). Smith acknowledges that the offense was a Class A felony because the transaction took place within 1000 feet of a daycare center but argues that no children were present in the parking lot of the apartment building and that therefore the twenty-five year sentence is too severe. He cites no authority for this proposition and we know of none which would reduce the permissible sentence under the circumstances alluded to.

Smith acknowledges that his criminal history "is not unimportant." (Appellant's Br. at 17). He notes that his convictions in Illinois for possession of and dealing in cannabis and "Aggravated Driving While under the Influence" are all felonies under Illinois law. However, he asserts that these offenses and his two misdemeanor convictions for possession of cannabis and for disorderly conduct do not indicate a "person of reprehensible character who is beyond rehabilitation." (Appellant's Br. at 18).

In light of the mitigating circumstances, and most particularly the need and desire to care for his two children and his mother who is in poor health, Smith points to the preparation he has made for obtaining his GED to study auto mechanics. He requests that we reduce the sentence from twenty-five to twenty years with fifteen years to be executed in the Department of Correction.

We are not unmindful that a different sentencing authority, exercising its discretion, might well have imposed such a sentence. However, it must be noted that the advisory sentence for Smith's crime is thirty years. Smith concedes that the thirty years sentence "was meant to be the starting point for the court's consideration of the appropriate sentence . . . ." (Appellant's Br. at 15). In doing so, he correctly cites McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) (quoting Childress v. State, 848 N.E.2d 1073, 1081 (Ind. 2006)).

In the case before us, the court imposed less than the advisory sentence. In reviewing that sentence, we observe that no longer are we to exercise our discretion "with great restraint" nor are we required to be "very deferential" to the sentencing court. Stewart v. State, 866 N.E.2d 858 (Ind. Ct. App. 2007). Nevertheless, as noted in Stewart, Appellate Rule 7(B) itself calls for "due consideration of the trial court's decision" and that some degree of deference to the

sentencing court is contemplated. It is a given that a defendant has the burden of persuading this court that his sentence is inappropriate. Stewart, id.

In light of the existing law and under the facts and circumstances of this case, we are unable to hold that Smith's twenty-five year sentence is inappropriate.

The conviction and sentence imposed are affirmed but the case is remanded to the trial court with instructions to vacate the order of reimbursement for Smith's trial representation.

BAKER, C.J., and VAIDIK, J., concur.